IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 304

EUGENE DIETZGEN CO.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF OF PETITIONER.

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The attempt of counsel for the Commission to state on two pages of their brief a summary of the Commission's voluminous findings of fact, is commendable in the interest of brevity, but gives a picture which in our view does not correctly reflect the salient facts. We believe their brief requires a reply which we shall make as short as possible.

We are unable to understand the relevance or materiality of the opening statement in respondent's brief on page 4 referring to the alleged agreement as to prices in 1932, in view of the later statement (p. 9) that

> "what took place in 1932 and 1933, while of some historical interest, is only remotely relevant to the issue raised by the Commission's complaint, filed in 1937: whether the SDC members were using any unfair methods of competition in interstate commerce."

The statement (p. 4) that:

> "When the Act was declared unconstitutional they agreed to continue in force subject to rewriting 'in a legally acceptable form,' the code's requirement that price lists be filed with SDC and that no one should sell at lower prices or on more favorable terms than those set forth in his filed price lists (Rec. 816-817),"

is not in accord with paragraph 8 of the Commission's findings of fact (R. 817) which refers to what took place after Section 3 of the National Industrial Recovery Act had been declared unconstitutional.

Secondly, it is not in accord with paragraph 7 of the Commission's findings of fact (R. 816) as to the matters and things that petitioner and others were required to do and perform during the period the National Industrial Recovery Act, code and supplemental code were in effect.

Lastly, said statement is not in harmony with the actual fact as to what took place at Atlantic City following the decision of this Court in *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, and referred to in paragraph 8 of the Commission's finding of fact (R. 817), and said finding of fact does not accord with paragraph 29 of the stipulation of facts entered into by petitioner and respondent as to the action of the SDC Section taken at its meeting on June 3, 1935, at Atlantic City. (R. 141, 142.)

The code under the N. I. R. A. offered in evidence (Exhibit 2) is the same as Exhibit A attached to the answer of petitioner before the Commission (R. 30 to 39). Article I stated the purposes of the Code; Article II contained the definitions of the industry, employee, employer and member of the industry; Article III covered hours of service; Article IV, wages; Article V, general labor provisions; Article VI, related to administration; Article VII, trade practices, and Article VIII, provision as to modification.

The supplemental code under the N. I. R. A. (Exhibit 4)

applied only to the SDC Section and it superseded Article VII of the code relating to trade practices. The matters and things set forth in paragraph 27 of the stipulation (R. 140, 141) which were required to be done by the members of the SDC Section under the N. I. R. A. were in the beginning required under the direction of the Manager, pursuant to the provision of Section 2 of Article VII of the code. After the adoption of the supplemental code, Exhibit 4 (par. 22, Stip. R. 138), the matters and things set forth in paragraph 27 of said stipulation (R. 140, 141), required of the members of the Section were based upon directions of the Manager in accordance with the provisions of the supplemental code and paragraph 12 of said supplemental code (Ex. 4) related to prices and price filings.

As shown by paragraph 29 of the stipulation (R. 141), after the N. I. R. A. the provisions of the code agreed to be observed had no relation to prices or price filings.

Paragraph 12 of Exhibit 4, which related to prices and price filings was not agreed to be observed. It was discontinued for the purpose of rewriting and further submission to the Section by the Executive Committee (Stip. par. 29, R. 141, 142). This paragraph of Exhibit 4 was never rewritten or resubmitted to the Section. At its meeting on June 1, 1936, the question was presented in a totally different form, as shown in paragraph 10 of the Commission's findings of fact (R. 818).

In this provision so adopted *price filing* was wholly eliminated.

The further statement appearing in the last paragraph on page 4 of said brief,

> "the substitute rule adopted, as modified in June 1936, was that no sale be made 'at less than the lowest net price *filed and published* by any member' (R. 817-818)" (Italics supplied),

is quoted from the finding of fact relating to the October

29, 1935 meeting (Par. 9, R. 817), and is not as stated in the brief the rule adopted in June, 1936.

The quotation in the brief refers to a proposed rule which is quoted in paragraph 9 of the Commission's findings of fact (R. 817) which was tentatively considered by the SDC Section as a part of the proposed code for the entire industry at Cleveland on October 29, 1935 (Exhibit 9; Stip. par. 30; R. 142), but which it was stipulated was never adopted (Stip. par. 30, R. 142).

It is sub-section 4.1 of Article VII of Exhibit 9, a proposed code for the entire industry. Even if said code had been adopted and approved (which it was not), Article I thereof provided that the same would not bind any individual member of the industry, unless he gave his *written* approval or assent thereto, and petitioner never gave such written approval or assent (Ex. 9, Art. I, Examiners Orig. Rept. Par. 39, R. 676; Examiners Supp. Rept. Par. 39, R. 783; Allin R. 586, 587).

The respondent in its brief in the Circuit Court of Appeals on page 29 conceded that the rule a portion of which is quoted in Respondent's brief (p. 4), was never adopted or effective. It said:

> "It will be noted that the Rules of Fair Competition adopted by the Section on June 1, 1936 (Com. Ex. 11A), were not merely 'proposed' rules, as were those approved by the Section at the October 29, 1935 meeting (Com. Ex. 9), and were not a 'supplementary' code such as Commission's Exhibit 9A. * * * The 1936 Rules were *adopted* by the Section, not merely approved, as were the 1935 Proposed Rules."

There is a marked difference between the rule adopted at the meeting in Chicago on June 1, 1936, quoted in paragraph 10 of the Commission's findings of fact (R. 818), and the rule quoted in part in Respondent's brief and in full in paragraph 9 of the Commission's findings of fact relat-

ing to the October 29, 1935, meeting (R. 817), but which was never adopted (Stip. 30; R. 142).

The provision quoted in Respondent's brief and erroneously stated to have been adopted in June 1936, relates to prices *filed and published*, while the provision in fact adopted June 1, 1936 (findings of fact par. 10, R. 818) relates only to *published* prices, and the price filing provisions of paragraph 12 of the supplemental code, Exhibit 4, were wholly eliminated.

The language appearing on the top of page 5 of Respondent's brief "and otherwise gave assurance against variation from published prices and terms (R. 818-819)" is only a conclusion of counsel. It is not a statement of fact that is supported by any finding of fact on the pages of the record cited in said quotation.

The statement in Respondent's brief (p. 5) that "SDC was active in securing observance of its rules, (R. 819)", must relate in time to the period when the code Exhibit 2, and the supplemental code Exhibit 4 were in effect under the N. I. R. A. as there is nothing in the portion of the record cited that indicates the SDC Section did anything whatsoever in regard to the complaint of the individual member to which the Commission alluded on the page of the record cited above in Respondent's brief.

The statement (p. 5) that

> "The 11 members of SDC named as respondents in the Commission's complaint (including petitioner) have agreed to fix and maintain the prices at which they sell; not to sell at prices or on terms more favorable than those contained in any price list *filed with SDC* * * * and to file with SDC schedules showing their prices and other terms of sale (R. 823-824)" (Italics supplied).

conveys the impression that the "11 members" made some agreement other than that already referred to in Respond-

ent's brief, while the finding of fact cited in support (R. 823-824) refers to the agreements in paragraphs 6, 8, 9 and 10 of the findings of fact which have already been referred to in the previous statements in the brief.

Furthermore, subparagraph (f) of paragraph 13 of the Commission's findings of fact (R. 824), concerning price filing, must refer to price filings on blue print papers and cloths made with the SDC Section during the time the code (Exhibit 2) and supplemental code (Exhibit 4) were in effect under the N. I. R. A., which filings were required by that Act.

The undisputed testimony of the witness Parker, Manager of the SDC Section, shows that the only price filings were on blue print papers and cloths, and that no price filings were made subsequent to May 27, 1935, the date Section 3 of the Act was declared unconstitutional by this Court. (Parker, R. 542-551.)

ARGUMENT.

I.

In answering petitioner's contention that acts which constitute a violation of the Sherman Act, are not within the purview of the Federal Trade Commission Act, respondent contends that this Court has held to the contrary, and cites *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 61-62. Respondent further states that this Court in that case upheld provisions of an order under the latter Act directed against price fixing agreements. Petitioner does not dispute that this Court upheld the order in that case. Petitioner's contention under Reason I for the issuance of the writ is that this Court had never decided the question presented in this case in any case where that question had been specifically raised. That it was not raised in the *Pacific States Paper Trade Association* case, is definitely admitted by respondent on page 7 of its brief.

In fact as pointed out in our brief, there is no mention in the opinion in that case of either the Sherman Act or the Clayton Act.

A case in which the question here presented was not raised, discussed or passed upon cannot properly be held *stare decisis* in a later case where the question is definitely raised and presented for decision.

Respondent also cites in support of its contention *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U. S. 457, 463. The petitioner has fully analyzed this case in its brief filed in support of its petition for the writ (pp. 7-11). We merely reassert that the *Fashion Guild* case did not decide the question here involved and presented by the peti-

tion. This Court in the *Fashion Guild* case did not have before it the question now presented, nor was it discussed.

Respondent cites (p. 6) *Federal Trade Commission* v. *Beechnut Packing Company*, 257 U. S. 441, 453-455. On page 11 of its brief, petitioner has fully analyzed said case.

We contend here, as we contended in our brief in support of the petition, that this Court did not in the *Beechnut* case, *supra*, decide the question stated under Reason I in the petition for the allowance of the writ.

Respondent on page 6 of its brief concedes that it is not authorized to enforce the Sherman Act. On page 7 of its brief, however, respondent states:

> "The conduct which violates the Trade Commission Act does not cease to be such because it also violates the Sherman Act."

In support of this contention respondent cites in a footnote on page 7 the cases of *Gavieres* v. *U. S.*, 220 U. S. 338, and *Blockburger* v. *U. S.*, 284 U. S. 299. In our view neither of these cases has any application to the question involved. In each of the cases cited the ordinances and statutes involved made the same acts different crimes with jurisdiction to enforce granted to a court in each instance. We do not controvert the rule announced in these cases. The question presented by the petition, in the instant case, however, is not within the said rule.

The Sherman Act specifically vests jurisdiction in the District Court of the United States to enforce its provisions. An administrative tribunal, such as respondent, cannot under the guise of preventing unfair methods of competition charge completed and continuing violations of the Sherman Act and thus assume the jurisdiction of the District Courts to enforce the provisions of said Act. To permit respondent to do so would extend to it the power and

jurisdiction of a court with authority to determine that the Sherman Act *had been* violated, a power which cannot be constitutionally granted to it because it is not a court. It cannot usurp the jurisdiction specifically vested in the District Court by that Act.

In the two cases cited by respondent and above referred to, each ordinance and statute involved defined the separate offenses. The Sherman Law definitely defines violations thereof and prescribes the civil and criminal remedies. *There is no definition of unfair methods of competition in the Federal Trade Commission Act.*

The strictness with which statutory jurisdiction of a court or administrative tribunal *as to remedy* must be observed, is well illustrated by the case of *United States Navigation Company* v. *Cunard Steamship Company,* 284 U. S. 474. In that case the Navigation Company brought suit in the District Court for the Southern District of New York to enjoin respondents from continuing an alleged combination and conspiracy in violation of the Sherman Anti-Trust Act, 15 U. S. C. A. Secs. 1-7, and of the Clayton Act, Title 15, U. S. C. A. Secs. 12-37.

The District Court sustained a motion to dismiss on the ground that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board, under the Shipping Act of 1916, 39 Stat. Ch. 451, as amended by the Merchant Marine Act of 1920, Ch. 250, 41 Stat. 988 (46 U. S. C. A. Secs. 801-842). The Circuit Court of Appeals of the Second Circuit affirmed the action of the District Court (p. 478).

This Court on page 480 of its opinion in the above case stated in substance, that giving consideration alone to the Sherman Anti-Trust Act, the bill stated a cause of action under Sections 1 and 2 of that Act and furnished the ground

for an injunction under Section 16 of the Clayton Act, *unless the Shipping Act of 1916 stood in the way.*

This Court held that the Shipping Act of 1916 as amended by the Merchant Marine Act of 1920 as aforesaid, gave to the United States Shipping Board exclusive primary jurisdiction to determine whether or not the agreements and combinations complained of in the bill as violative of the Anti-Trust Act were unlawful or discriminatory under said Shipping Act and said Merchants Marine Act.

This Court further said in substance (Opinion 485, 486) that the *remedy* for the charges in the bill was that afforded by the Shipping Act, which to that extent superseded the Anti-Trust laws.

At the time of the filing of the bill in the above case, the exclusive remedy before the Shipping Board for the acts complained of had not been invoked. This Court in said case clearly determined from the matters pleaded in the bill that the exclusive jurisdiction of the remedy was in the Shipping Board.

The complaint in the present case charges acts (Pars. 7, 8, R. 6, 7) which if true are in fact complete and continuing violations of the Sherman Act, and not only the charges but the Commission's findings of fact are worded in almost the exact language of that Act. (Par. 20, R. 825.) The Department of Justice had not at the time instituted a proceeding in the District Court which had exclusive jurisdiction over the remedy for the acts complained of before the Commission. This brings the instant case definitely within the rule as announced in the *Navigation Company* case, *supra.*

The real question in the instant case as to the jurisdiction is: Where does the remedy lie for the acts complained of?

The remedy for such acts is vested exclusively in the District Court.

Jurisdiction of the remedy is the question decided by this Court in the *Navigation Company* case, *supra.*

In a more recent case this Court announced and applied the same rule.

Armour & Co. v. *Alton Railroad Co. et al.*, 312 U. S. 195.

In the two cases cited the jurisdiction of the District Court to entertain the remedy was denied, because the remedy therefor was by the respective statutes specifically confided to the respective administrative bodies therein referred to. Those cases are even stronger than the present case. In the present case, the jurisdiction to enforce the provisions of the Sherman Act is exclusively vested in the District Court, and there is no provision in the Federal Trade Commission Act vesting jurisdiction in it as to matters within the scope of the Sherman Act.

Petitioner earnestly asserts that the present case is clearly within the doctrine announced by this Court in the cases last referred to. As fully shown in our brief, it seems clear that Congress, in enacting the Federal Trade Commission Act, intended to reach activities that were not within the scope of the Sherman Act.

II.

Respondent under point II of its brief (p. 7) does not correctly state the contention of petitioner set forth in its brief in support of the writ, pages 23-25. In the pages of petitioner's brief referred to, the contention is that in order to show unfair methods of competition under Section 5 of the Federal Trade Commission Act, it must also be shown that there is competition and that someone engaged in the industry involved must be injured or injuriously affected in his business by the unfair competi-

tion of competitors. In the present case the Commission charged and found that by the acts complained of petitioner and other respondents before the Commission had entirely eliminated competition in the industry.

We contended that in the absence of competition injurious to one engaged in such industry or injuriously affecting his business, unfair methods of competition under Section 5 of the Federal Trade Commission Act did not exist; that in the absence of competitors there could be no competition; that competition must be shown to permit a determination that it was unfair; that competition to be unfair must injuriously affect some competing member of the industry and cited in support of this contention *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 645, 647, 654, and *Federal Trade Commission* v. *Raladam*, 316 U. S. 149, 152.

Respondent, in support of its erroneous statement as to petitioner's contention, cites *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, as a holding directly contrary to said incorrect statement of petitioner's contention. This case does not hold that a combination to maintain minimum prices, not injurious to competitors of those combining was an unfair method of competition within the meaning of the Federal Trade Commission Act. The question as stated by respondent was not involved in the *Pacific States Paper Trade Association* case. The question of other competitors and whether the unfair methods of competition had an injurious effect, was not called to the attention of the Court. Neither the Sherman Act nor the Clayton Act were referred to in that case.

Furthermore, *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, which announced the necessity for competitors or competition and that such competition should not

only be unfair but should be injurious to others engaged in the business, had not been decided at the time of the decision in the *Pacific States Paper Trade Association* case. Respondent, however, concedes on page 7 of its brief that the point actually raised by petitioner was not discussed in the *Pacific States Paper Trade Association* case.

In the case of *California Rice Industry* v. *Federal Trade Commission*, 102 F. (2d) 716, 720-722 (C. C. A. 9), the question of the jurisdiction of the Commission to charge complete violations of the Sherman Act and then declare the same to constitute unfair methods of competition, was not raised.

On page 8 of its brief respondent states in substance, that the finding in this case that in the summer of 1932 petitioner and other members of SDC were in active and substantial competition with each other and with other members of the industry, but that since the adoption of the restrictive price fixing practices competition has been eliminated, takes this case out of the rule announced in the *Raladam* case *supra*. Petitioner on page 24 of its brief has fully answered this contention of respondent.

In addition, it should be observed that the alleged elimination of competition was not the result of the alleged conspiracy of 1932, but was legally sanctioned by the code (Exhibit 2) and supplemental code (Exhibit 4) covering a period from November 14, 1933 (the effective date of the code), and continuing under the supplemental code (Exhibit 4), *at least* until May 27, 1935, the date that this Court declared Section 3 of N. I. R. A. to be invalid.

During the period mentioned, under Section 5 of N. I. R. A. (48 Stat. Ch. 90, Sec. 5, 195) neither the courts nor the Federal Trade Commission had the lawful power to institute a proceeding involving any acts done pursuant to said code (Exhibit 2), or the supplemental code (Ex-

hibit 4), claimed to violate any of the anti-trust laws. Such activities, as well as the parties thereto, were by said Section 5 aforesaid, given complete exemption from the provisions of the anti-trust laws. The record shows that subsequent to May 27, 1935 and beginning on June 3, 1935, the SDC Section wholly abandoned the former provision of Exhibit 4, paragraph 12, thereof, which related to price filing and price maintenance. (Stip. par. 29, R. 141, 142, 817); that subsequent to and up to June 1, 1936 no action was taken by the petitioner or the SDC Section that resulted in the final adoption of any rule or regulation pertaining to price filing or price maintenance, (Stip. par. 30, R. 142; par. 9, R. 817). It was not until June 1, 1936 that any definite action was taken by petitioner and the SDC Section for the establishment of a rule pertaining to prices, and that rule eliminated *price filing* and related only to *price publication* by the individual members of the Section, (Stip. par. 31, R. 142, 143; par. 10, R. 818). All activities of petitioner and the SDC Section beginning on June 3, 1935, and continuing to June 1, 1936 and thereafter, were undertaken by them in good faith attempts to comply with the President's request for voluntary code observance, Exhibit 6 (Stip. R. 141; Roberts, R. 324, 326, 327). Hence, there can be no relation between the activities complained of prior to June 1, 1936 and those which took place on and after that date. This contention of petitioner is in substance conceded by respondent on pages 9 and 10 of its brief.

U. S. v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, a proceeding instituted under the Sherman Act, is cited by respondent on page 8 of its brief in support of its contention that it is clearly unfair within the meaning of the Federal Trade Commission statute, to use in competition a means or method of trade such as price fixing which is made unlawful under the Sherman Act. But the case cited

does not decide that question. It merely decided that price fixing agreements duly entered into were unlawful under the Sherman Act. This was a decision by a court having judicial power to determine that said Act had been violated. These agreements were complete at the time the court assumed jurisdiction in that case. We doubt that respondent would now contend that it could, during the pendency of the *Socony* case, or thereafter have instituted a complaint under Section 5 of the Federal Trade Commission Act alleging that the identical acts before the court constituted unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

The case of *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 27, cited by respondent on page 8 of its brief, has no application to the question presented to this Court.

III.

Under respondent's point III it refers to petitioner's Reason V for the writ. The contention of petitioner is that it was denied a fair hearing before the Commission. Respondent does not really meet the contention of the petitioner. The investigator of the Commission testified that at the time he obtained the documents in question (Exhibits 155-159) he at the same time and as a part of the same investigation, obtained other correspondence which showed no violations of law. (R. 459.) Respondent having introduced the exhibits in question, petitioner, on the statement of the Commission's investigator coupled with proof that all of the correspondence in the files investigated had been destroyed and the same were not available to petitioner from any other source, asked the Commission to produce such other correspondence that its investigator had testified was then in the possession of the

Commission. The Commission declined to furnish or produce any of such other correspondence. (R. 457.)

Respondent now says that petitioner has made no showing that it was in any way prejudiced by such action of the Commission. The contents of the correspondence no one knows except the Commission. Its materiality or relevancy could only be determined upon its production. Whether it would have been beneficial to petitioner and the other respondents could only be definitely ascertained upon the production of such other correspondence.

The presumption, however, is strong that the Commission having such correspondence in its possession, would have presented the same with the other exhibits, if it had thought that the same constituted any evidence of law violation. The fact that the investigator stated that he took all correspondence bearing on the nature of the investigation whether it showed law violations or not, gives rise to the presumption that it may have furnished some proper explanation of the matters and things set forth in the correspondence included in the exhibits offered by the respondent. Whether or not the correspondence which respondent refused to disclose would have been beneficial, is really beside the point. The fact is that any governmental administrative agency, such as respondent, in conducting a hearing, is governed by rules of administrative conduct which must always embrace fair dealing with the parties before it.

When it offers at a hearing correspondence or documents obtained by one of its investigators in the course of an investigation, it violates the rule of fair play, and fails to grant a full hearing, when it denies to an interested party access to such other correspondence in its possession, obtained in the same investigation by the same investigator,

and instead actually conceals the same, and places it beyond the reach of the interested party.

Respondent also seems to have misapprehended somewhat the scope of our contention in this respect. One of the five letters in the exhibits was a copy of a letter to a representative of the petitioner. Our contention is not as to the correspondence embraced within the exhibits offered, and produced. It goes to the correspondence obtained at the same time by the Commission, which it has steadfastly refused to produce upon the request of petitioner, and which it has at all times concealed. We think its action is clearly in conflict with the decision of the Circuit Court of Appeals of the 6th Circuit in *Powhatan Mining Company* v. *Ickes, et al.*, 118 Fed. (2d) 105, 106, 109, cited on page 32 of petitioner's brief.

Since the respondent in its brief (p. 10) states there is no serious challenge to the sufficiency of the evidence to support the Commission's findings, it seems appropriate to make response thereto.

It is petitioner's understanding that a discussion of the insufficiency of the evidence to support a finding is not permissible upon a petition for the issuance of a writ of certiorari. However, on pages 18-20 of the petition for the writ petitioner states the questions presented, and question 5 challenges the sufficiency of the evidence to support the findings, and further that the findings are contrary to the undisputed evidence of record. Should this writ be granted and the case heard on its merits, petitioner would earnestly and in good faith urge that the Commission's findings are not only not supported by valid evidence, but that the same are contrary to the undisputed evidence of record.

Conclusion.

Petitioner earnestly contends that the issuance of the writ as prayed for is justified under each of the several reasons for the issuance of the writ as set forth in the petition therefor.

Respectfully submitted,

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